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Kamal Hisham bin Ja'afar v Public Prosecutor

B HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NOS 42S-9–06 OF 2016 AND 42S-10–06 OF 2016
COLLIN SEQUERAH JC
28 NOVEMBER 2016

C *Criminal Procedure — Disclosure of information — Documents — Appeal against order to produce documents and materials — Whether application by prosecution meritorious — Whether appeal violated doctrine of finality — Whether session court judge erred in law and/or fact in finding — Whether alleged application was a 'fishing expedition' — Criminal Procedure Code s 51*

D

The appellant was charged at the Johor Bahru Sessions Court on four counts of criminal breach of trust under s 409 of the Penal Code, two counts of the offences under ss 131(1) and 132(2) of the Companies Act 1965 and nine counts of money laundering under s 1(1) of the Anti-Money Laundering, E Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. During the proceedings, the respondent had applied under s 51 of the Criminal Procedure Code ('the CPC') for production of original documents in the possession of the appellant, where the respondent had copies. The learned sessions court judge ('the SCJ') allowed the said application and hence, this F appeal. The appellant submitted that the application ought to have been directed toward Point Convenience Shop Sdn Bhd and Met Mint (M) Sdn Bhd ('the companies') instead because: (a) the respondent failed to prove that the police had conducted investigations on the companies in order to obtain the said documents before filing this application; and (b) the documents related to G companies where the appellant at all material times was not the director nor did he have any direct access or keep any of the documents belonging to the companies. The appellant also submitted the SCJ had erred in law and/or fact in finding: (i) that the appellant had the knowledge on the location of the documents requested because he managed the operations of the companies H Southern Ads Sdn Bhd, Southern Flame Sdn Bhd and Messrs Kamal Hisham & Assoc; (ii) that no prejudice would be occasioned to the appellant as he could furnish an explanation of whether the documents requested were within his possession or not; and (iii) that the documents were necessary in order to rebut any suggestion of adverse inference under s 114(g) of the Evidence Act 1950. In I return, the respondent submitted that the decision of the SCJ was not appealable as it lacked finality since it did not have the effect of disposing the right of the appellant and the appeal was null, void and nugatory. The respondent further submitted that all the documents were important to prove the charges of criminal breach of trust and other criminal charges and that they

had fulfilled all pre-requisites and conditions as prescribed in s 51 of the CPC and also had satisfied the test of relevancy. The court had to decide on whether the application by the prosecution was meritorious and whether this appeal was filed for want of jurisdiction because it was not an appealable matter that finally disposed of the rights of parties and therefore violated the doctrine of finality.

Held, dismissing the appeal:

(1) The facts of the present case were slightly different from *Dato Seri Anwar Ibrahim v Public Prosecutor* [2010] 2 MLJ 312. The purpose of the order by the SCJ was one grounded rather upon the necessity of the prosecution in avoiding an anticipated allegation of adverse inference under s 114(g) of the Evidence Act 1950 in absence of the production of the original documents during the trial. It was unconnected with the preparation of the case by the prosecution per se. Therefore, the rights of the appellant could be said to be disposed of with finality within the meaning of s 3 of the Courts of Judicature Act 1964. Accordingly, this matter was rendered unappealable, resulting in this appeal being null, void and nugatory and this appeal ought to be dismissed on this point alone (see paras 42 & 44–45).

(2) The test of relevancy was satisfied. This was because all the original documents necessary to prove the criminal breach of trust charges were indispensable to the prosecution in order to prove the charges. The documents were precisely described and left nothing to the imagination. Therefore, it could not be alleged that documents sought lacked specificity nor were they in the nature of a fishing expedition. As the appellant was the majority shareholder of Southern Flame Sdn Bhd and senior partner in the firm of Messrs Kamal Hisham & Assoc, it was only reasonable to assume the original documents were either within his possession or that he had unhindered access to them (see paras 54 & 56–57).

(3) The SCJ had not erred in law or fact in allowing the application by the prosecution under s 51 of the CPC and neither did she err in holding that the documents were necessary for the prosecution in avoiding any anticipated allegation during the course of the trial, of adverse inference under s 114(g) of the Evidence Act 1950 for the failure to produce the original documents. All pre-requisites of s 51 were therefore satisfied (see paras 61–62).

[Bahasa Malaysia summary

Perayu telah dituduh di Mahkamah Sesyen Johor Bahru atas empat kesalahan jenayah pecah amanah di bawah s 409 Kanun Keseksaan, dua kesalahan di bawah ss 131(1) dan 132(2) Akta Syarikat 1965 dan sembilan kesalahan pengubahan wang haram di bawah s 1(1) Akta Pencegahan Pengubahan Wang

Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001. Semasa prosiding, responden telah memohon di bawah s 51 Kanun Tatacara Jenayah ('KTJ') untuk penzahiran dokumen-dokumen asal dalam milikan perayu, yang mana responden mempunyai salinan-salinannya. Hakim mahkamah sesyen yang bijaksana ('HMS') telah membenarkan permohonan tersebut dan justeru, rayuan ini. Perayu berhujah bahawa permohonan itu patut sebaliknya diarahkan kepada Point Convenience Shop Sdn Bhd dan Met Mint (M) Sdn Bhd ('syarikat-syarikat tersebut') kerana: (a) responden telah gagal untuk membuktikan bahawa polis telah menjalankan siasatan ke atas syarikat-syarikat tersebut bagi tujuan mendapat dokumen-dokumen tersebut sebelum memfailkan permohonan ini; dan (b) dokumen-dokumen tersebut yang berkaitan dengan syarikat-syarikat tersebut di mana perayu pada setiap masa matan bukanlah pengarah itu ataupun dia mempunyai akses terus atau menyimpan apa-apa dokumen-dokumen yang dimiliki syarikat-syarikat tersebut. Perayu juga berhujah HMS terkhilaf dari segi undang-undang dan/atau fakta dalam mendapati: (i) bahawa perayu mempunyai pengetahuan berhubung lokasi dokumen-dokumen yang dipohon kerana dia menguruskan operasi-operasi syarikat-syarikat Southern Ads Sdn Bhd, Southern Flame Sdn Bhd dan Tetuan Kamal Hisham & Assoc; (ii) bahawa tiada prejudis berlaku kepada perayu kerana dia boleh memberi penjelasan tentang sama ada dokumen-dokumen yang dipohon adalah dalam milikannya atau tidak; dan (iii) bahawa dokumen-dokumen itu perlu bagi tujuan mematahkan apa-apa cadangan inferens bertentangan di bawah s 114(g) Akta Keterangan 1950. Sebagai balasan, responden berhujah bahawa keputusan HMS tidak boleh dirayu kerana ia tiada kemuktamadan kerana ia tidak mempunyai kesan melupuskan hak perayu dan rayuan itu adalah terbatal, tidak sah dan sia-sia. Responden selanjutnya berhujah bahawa semua dokumen-dokumen itu penting untuk membuktikan pertuduhan-pertuduhan jenayah pecah amanah dan pertuduhan-pertuduhan jenayah lain dan bahawa mereka telah memenuhi kesemua prasyarat dan keperluan sepertimana dinyatakan dalam s 51 KTJ dan juga telah memenuhi ujian kerelevenan. Mahkamah perlu memutuskan sama ada permohonan oleh pendakwaan mempunyai merit dan sama ada rayuan ini telah difailkan kerana kehendak bidang kuasa sebab ia suatu perkara yang tidak boleh dirayu yang akhirnya melupuskan hak-hak pihak-pihak dan oleh itu melanggar doktrin kemuktamadan.

Diputuskan, menolak rayuan:

(1) Fakta kes ini berbeza daripada kes *Dato Seri Anwar Ibrahim v Public Prosecutor* [2010] 2 MLJ 312. Tujuan perintah oleh HMS adalah berasaskan keperluan pendakwaan mengelak dakwaan inferens bertentangan yang dijangkakan di bawah s 114(g) Akta Keterangan 1950 dengan ketiadaan penzahiran dokumen-dokumen asal sepanjang perbiacaraan. Ia tiada kaitan dengan persediaan kes oleh pendakwaan per

se. Oleh itu, hak-hak perayu boleh dikatakan telah dilupuskan dengan kemuktamadan dalam maksud s 3 Akta Mahkamah Kehakiman 1964. Berikutan itu, perkara ini dianggap tidak boleh dirayu, yang mengakibatkan rayuan ini terbatal, tidak sah dan sia-sia dan rayuan ini patut ditolak atas poin ini sahaja (lihat perekara 42 & 44–45).

(2) Ujian kerelevanan telah dipenuhi. Ini adalah kerana semua dokumen-dokumen asal yang perlu untuk membuktikan pertuduhan-pertuduhan jenayah pecah amanah adalah sangat diperlukan untuk pendakwaan membuktikan pertuduhan-pertuduhan tersebut. Dokumen-dokumen itu telah diterangkan dengan tepat dan bukan dari imaginasi. Oleh itu, ia tidak boleh dikatakan bahawa dokumen-dokumen yang dipohon tidak khusus atau bersifat umum. Oleh kerana perayu adalah pemegang saham majoriti Southern Flame Sdn Bhd dan rakan kongsi kanan dalam firma Tetuan Kamal Hisham & Assoc, ia hanyalah munasabah untuk mengandaikan dokumen-dokumen asal itu sama ada berada dalam milikannya atau bahawa dia mempunyai akses tanpa halangan ke atasnya (lihat perenggan 54 & 56–57).

(3) HMS tidak terkhilaf dari segi undang-undang atau fakta dalam membenarkan permohonan oleh pendakwaan di bawah s 51 KTJ dan beliau juga tidak terkhilaf dalam memutuskan bahawa dokumen-dokumen tu adalah perlu untuk pendakwaan mengelak daripada apa-apa dakwaan yang dijangkakan sepanjang berjalannya perbicaraan, berhubung inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 kerana kegagalan untuk mengemukakan dokumen-dokumen asal. Kesemua prasyarat s 51 dengan itu telah dipenuhi (lihat perenggan 61–62).]

Notes

For cases on disclosure of information through documents, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2330–2340.

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312, FC (distd)
Karpal Singh a/l Ram Singh v PP [2012] 5 MLJ 293, FC (refd)
PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP [1985] 2 MLJ 436, SC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 4(1)
Companies Act 1965 s 131(1), (2)
Courts of Judicature Act 1964 s 3

Criminal Procedure Code ss 51, 51A, 51A(1)(b), (1)(c), 112, 307(1), 418A
Evidence Act 1950 s 114(g)
Penal Code ss 377B, 409

Hassan Karim (Noor Liana bt Hashim and Nur Hannah bt Ishak with him) (Kamal Hisham & Assoc) for the appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Collin Sequerah JC:

INTRODUCTION

[1] Both appeals above were heard together as they involve similar issues. These appeals originate from the decisions of the sessions court which allowed an application by the prosecution for certain documents pursuant to the provisions of s 51 of the Criminal Procedure Code ('the CPC').

[2] Being aggrieved by the said decision, the appellant has filed these appeals. The issues raised in this appeal involve the question of whether the application by the prosecution was meritorious as well as the question of whether this appeal was filed for want of jurisdiction because it was not an appealable matter that finally disposed of the rights of the parties and therefore violated the doctrine of finality.

SALIENT BACKGROUND FACTS

[3] The appellant abovenamed was charged at the Johor Bahru sessions court on four counts of criminal breach of trust under s 409 of the Penal Code, two counts of offences under s 131(1) and two counts of offences under s 131(2) of the Companies Act 1965 and nine counts of money laundering under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

[4] In the course of the proceedings, there was an application made under s 51 of the Criminal Procedure Code for production of original documents in the possession of the appellant, the copies of which are in the possession of the public prosecutor ('the respondent').

[5] The documents applied for were as follows:

(a) receipts of payments, invoices and monthly rentals for RK17, First Floor, JB Sentral from Point Convenience Shop Sdn Bhd to:

(i) Tetuan Kamal Hisham & Assoc;

(ii) Southern Flame Sdn Bhd; and

(iii) Kamal Hisham bin Jaafar ('the appellant');

(b) letter of offer to let by Southern Flame Sdn Bhd of RK17, First Floor, JB Sentral to Point Convenience Shop Sdn Bhd;

(c) receipts of payments, invoices and monthly rentals for RK11, first floor, JB Sentral from Met Mint (M) Sdn Bhd to:

(i) Tetuan Kamal Hisham & Assoc;

(ii) Southern Flame Sdn Bhd; and

(iii) Kamal Hisham bin Jaafar (the appellant);

(d) letter of offer to let by Southern Flame Sdn Bhd of RK11, first floor, JB Sentral to Met Mint (M) Sdn Bhd.

[6] The learned sessions court judge allowed the public prosecutor's application for these documents. Hence this appeal.

SUMMARY OF SUBMISSIONS OF PARTIES

The appellant

[7] The appellant submitted that the documents belonging to Point Convenience Shop Sdn Bhd and Met Mint (M) Sdn Bhd issued to Southern Ads Sdn Bhd, Southern Flame Sdn Bhd and Kamal Hisham & Assoc relate to the leasing of RK11 and RK17, Level 1, JB Sentral.

[8] They submit that the respondent has failed to prove that the police had conducted investigations on Point Convenience Shop Sdn Bhd and Met Mint (M) Sdn Bhd in order to obtain the abovementioned documents before filing the said application.

[9] The appellant submitted that the documents relate to companies where the appellant at all material times was not the director nor did he have any direct access towards the documents or records nor did he keep any of the documents belonging to Point Convenience Shop Sdn Bhd and Met Mint (M) Sdn Bhd.

[10] They therefore submitted that the application ought to have been directed toward these said companies instead.

[11] The appellant further submitted that as he had left the country since March 2011, whereas he was detained on September 2015, this clearly showed

A he had no access or control of the records and documents at Southern Ads Sdn Bhd or Point Convenience Shop Sdn Bhd and Met Mint (M) Sdn Bhd.

[12] The appellant submitted that in June of 2011, he was excluded from the affairs of Southern Ads Sdn Bhd after which he was then arrested in Singapore in September of 2012 and charged at the sessions court on 3 September 2012, the point here being that the appellant did not have control of the said Kamal Hisham & Assoc or Southern Ads Sdn Bhd.

[13] The appellant submitted therefore that the learned sessions court judge had erred in law and/or fact in finding that he had knowledge on the location or whereabouts of the documents requested merely because he had managed the operation of the companies involved namely, Southern Ads Sdn Bhd, Southern Flame Sdn Bhd and Messrs Kamal Hisham & Assoc.

[14] The appellant submitted that the respondent's contention that the appellant was believed to have knowledge or whereabouts of the documents were based on statements given by prosecution witness where the source of the information was not clearly stated. These averments therefore amounted to 'hearsay' and ought not to be considered.

[15] The learned sessions court judge had thus erred in law and/or fact in finding that no prejudice would be occasioned to the appellant as he could furnish an explanation of whether the documents requested were within his possession or not.

[16] Finally, the appellant submitted that the learned sessions court judge had erred in holding that these documents were necessary in order to rebut any suggestion of adverse inference under s 114(g) of the Evidence Act 1950 on the part of the appellant at the trial and in order to fulfil the 'best evidence rule'.

The respondent

[17] The respondent in reply firstly submitted that the decision of the learned sessions court judge was not an appealable one as it lacked finality since it did not have the effect of disposing the right of the appellant.

[18] They cited the case of *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293 and s 3 of the Courts of Judicature Act 1964 in support. The respondent submitted that the appeal thus was null, void and nugatory.

[19] The respondent submitted further that they had fulfilled all the

pre-requisites and conditions as prescribed in s 51 of the CPC which were as follows, namely the following:

(i) relevancy;

(ii) specificity; and

(iii) the original documents being with the party against whom the order was sought.

[20] The respondent submitted that the charges as per the appeal record showed that the subject matter of the criminal breach of trust charges against the appellant were those relating to two floor spaces at JB Sentral namely, the following:

(a) RK17, First Floor, JB Sentral; and

(b) RK11, First Floor, JB Sentral

[21] These were let by Southern Flame Sdn Bhd, a company owned by the appellant and his family members although the two floor spaces were leased to Southern Ads Sdn Bhd (whose majority shares were held by IBZI Holdings Sdn Bhd).

[22] The respondents accordingly submitted that all the documents that would be important in proving the charges of criminal breach of trust and other criminal charges would hinge upon these original documents that formed the subject matter of the application.

[23] The respondent thus submitted that the test of relevancy had been satisfied.

[24] The specific documents sought for were the following:

(a) receipts of payment of rental, invoices and monthly rental of RK17, First Floor, JB Sentral from Point Convenience Shop Sdn Bhd to:

(i) Tetuan Kamal Hisham & Assoc;

(ii) Southern Flame Sdn Bhd; and

(iii) Kamal Hisham bin Jaafar (the appellant);

(b) letter of offer to let by Southern Flame Sdn Bhd of RK17, First Floor, JB Sentral to Point Convenience Shop Sdn Bhd;

(c) receipts of payment of rental, invoices and monthly rental of RK11, First Floor, JB Sentral from Met Mint (M) Sdn Bhd to:

(i) Tetuan Kamal Hisham & Assoc;

(ii) Southern Flame Sdn Bhd; and

(iii) Kamal Hisham bin Jaafar (the appellant);

(d) letter of offer to let by Southern Flame Sdn Bhd of RK11, First Floor, JB Sentral to Met Mint (M) Sdn Bhd.

[25] The respondent submitted that accordingly, the test of specificity of documents were also satisfied.

[26] The respondent further submitted that in respect of condition (iii) namely, that the original was with the party against whom the order was sought, it ought to be emphasised that the appellant was the majority shareholder of Southern Flame Sdn Bhd and also the senior partner in Messrs Kamal Hisham and Assoc.

[27] The respondent finally submitted that given the fact that they had shown the specificity of the documents applied for and their respective relevancy, it cannot be said that the application was a 'fishing expedition'.

ANALYSIS AND DECISION

[28] This application by the prosecution is slightly unusual in the sense that normally, an application of this nature would be made by an accused and not, as here, by the prosecution. There is however, nothing in the wording of s 51 to indicate that its scope is limited to an application by an accused. In considering this appeal, I will at the outset first tackle the preliminary objection raised by the respondent in respect of this application.

Preliminary issue

[29] The first issue that merits consideration is whether the order or decision made by the learned sessions court judge was a final order and therefore one that was appealable? The determination of this issue, if the answer to the question posed is in the negative, will effectively determine the outcome of this appeal.

[30] In the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312, it was held that a decision or order to issue a summons under s 51 of the CPC is a final order in the sense that it is final in its effect and is therefore appealable under s 307(1) of the Criminal Procedure Code ('the CPC').

[31] In that case the appellant, Dato' Seri Anwar bin Ibrahim, was originally charged in the sessions court under s 377B of the Penal Code, to which he pleaded not guilty. He was alleged to have committed the offence against one

Mohd Saiful Bukhari ('the complainant') on 26 June 2008 at Unit 11–5–1, Desa Damansara Condominium Bukit Damansara, Kuala Lumpur ('the condominium'). A

The case was then transferred to the High Court on a certificate under s 418A of the Criminal Procedure Code ('the CPC'). The appellant filed an application by way of an originating motion under s 51 and/or s 51A of the CPC, for an order to compel the respondent and/or other persons having custody, care and control, to produce to the appellant, inter alia, the following materials: B

(a) the original CCTV recordings allegedly taken from the guardhouse and lifts in Block 11 of the condominium and any other locations fitted with CCTVs within the condominium; C

(b) the original DNA samples, original swabs taken off the complainant, slides made during testing, pictures of the slides and the 'Electro Pherogram' for each sample; D

(c) the notes of the chemists who did the testing and analysis on the DNA samples;

(d) the doctors' notes, photographs and report of the proctoscopy or other tests done on the complainant; E

(e) the video recording of statement by the complainant;

(f) witness statements made under s 112 of the CPC;

(g) copies of all documents and items which would be produced by the respondent under s 51A(1)(b) of the CPC; F

(h) a statement of facts favouring the appellant under s 51A(1)(c) of the CPC;

(i) all documents and items that will not be used by the respondent in the trial; G

(j) a list of the prosecution witnesses; and

(k) an order that the respondent disclose to him and/or that the appellant be allowed to inspect, all the documents and items mentioned above. H

[32] The High Court allowed most parts of the appellant's application for the production of documents and materials applied for. The Court of Appeal however allowed the respondent's appeal against the whole order of the High Court. The appellant appealed to the Federal Court. I

[33] At the Federal Court, learned counsel for the appellant raised a preliminary objection arguing that the matter now before the Federal Court was not appealable on the grounds that the decision by the trial court on the

originating motion was merely a procedural ruling not affecting the rights of the parties, and that, that ruling did not finally dispose of the rights of the parties.

[34] The apex court observed, inter alia, the following:

> However, it must be stressed that there are fundamental safeguards built into the law to guarantee equality and fairness in a trial. For this appeal, we have mentioned this earlier in our discussion on discovery under s 51 of the CPC. It needs also be stated that these safeguards are to be examined against the primary consideration that the prosecution's duty is to prosecute not to defend (see Lord Goddard CJ's remarks in *Rex v Bryant And Dickson* (1946) 31 Cr App R 146).

[35] In the *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* case, learned counsel for the appellant had referred to the explanatory statement of the Bill when emphasising the rationale behind s 3 of the CJA as follows:

> At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This causes a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.

[36] Section 3 of the Courts of Judicature Act 1964 ('the CJA') defines 'decision' as follows:

> decision means judgment, sentence or order, but *does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties*. (Emphasis added.)

[37] The apex court however in dismissing the preliminary objection by counsel for the appellant held:

> The appellant's application to have access to the various materials was an exercise of the right given to him by s 51 of the CPC. The order made by the High Court in allowing access to some of the materials had, in effect, disposed of the rights of the appellant under s 51 of the CPC. It was not an interlocutory order, nor one that was made in the course of a trial. It stood on its own. Thus the order made by the learned judge on that application was a final order which was appealable.

[38] Reverting to the instant case, the learned deputy public prosecutor however submitted that the decision based on the facts in the *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* case can be distinguished.

[39] The learned deputy public prosecutor in submitting that the order of the learned sessions court judge is not final in that it disposes the right of the appellant in the trial cited the case of *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293, which held:

> Section 3 of the CJA excludes any ruling made in the course of a trial which did not finally dispose of the rights of the parties in the trial. In order for a decision to be final, the defence must first be heard and after a maximum evaluation of the total evidence a decision would eventually be made, which then triggered the right of appeal

[40] It is to be noted that the apex court in the *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* case in deciding that the applicant's application under s 51 of the CPC was not an interlocutory order, nor one that was made in the course of a trial, based their decision upon the fact that although the appellant had contended that what he required was essential and relevant to the preparation of his defence, that stage had not yet arisen and was therefore not a relevant consideration at that point.

[41] The court further held that the charge against the appellant was sufficiently particularised and specific in order to accord the appellant a fair trial. The justice of the case was said to have thus been met. On the particular facts of the case therefore, the Federal Court dismissed the appeal on the grounds that it had not satisfied the requirements under s 51 of the CPC.

[42] On that score, I agree with the learned deputy public prosecutor that the facts of the instant case are slightly different in the sense that the purpose of the application here was unconnected with the purpose of the preparation of the case by the prosecution per se. The purpose of the order made by the learned sessions court judge here was one grounded rather upon the necessity of the prosecution in avoiding an anticipated allegation of adverse inference under s 114(g) of the Evidence Act 1950 in the absence of production of these original documents during the trial.

[43] Whereas in the *Dato' Seri Anwar* case, the effect of not making the order may have had the effect of infringing upon his rights to properly prepare his defence, the potential repercussions here in the event of a similar order being made or not, as the case may be, was less drastic and different and bore no resemblance to that case.

[44] The facts of the instant case are therefore readily distinguishable and the result is that the rights of the appellant here cannot be said to be disposed of with finality within the meaning of s 3 of the CJA.

[45] Accordingly, this matter was rendered unappealable, resulting in this appeal being null, void and nugatory. On this point alone, this appeal ought to be dismissed.

[46] However, notwithstanding my determination in respect of this preliminary point, for the sake of completeness, I proceeded to nevertheless consider and determine this appeal on its merits.

Merits of this appeal

[47] Section 51 of the CPC reads as follows:

> 51 Summons to produce document or other things
>
> (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.
>
> (2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.
>
> (3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

[48] Section 51 is not in the nature of a search provision and therefore does not entitle the police to enter and search premises. The section endows the court with wide powers of ordering production of documents necessary for the determination of matters before the court and to direct inspection of those documents. See *Mallal's Criminal Procedure* (7th Ed, LexisNexis) at para 275.

[49] The scope of the operation of s 51 was neatly encapsulated in the case of *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 as follows:

> Section 51 of the Criminal Procedure Code is a general provision to be invoked at any stage of an inquiry, investigation or trial or other proceeding under the Code. From the language it is plain that that section enables the court or police officer (as the case may be) if it or he considers that the production of any document or material is necessary or desirable, to issue a summons (in the case of the court) or a

written order (in the case of the police officer) to the person in whose possession or power the material or document is believed to be requiring such person to attend and produce the material or document at the time and place as stated in the summons or written order.

... *In exercising its discretion under s 51(i) of the Criminal Procedure Code the Court has to consider the justice of the case and at what stage of the proceeding the application is made*.

Where the Court is asked to exercise its discretion under s 51 of the Criminal Procedure Code before the commencement of trial the court must have regard to the provisions of ss 152, 153 and 154 of the Criminal Procedure Code relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularise the charge sufficiently so as to give adequate notice to the accused person. *The entitlement of the accused under section 51 of the Criminal Procedure Code to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the court having regard to the justice of the case*. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. *The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied*. The principle of justice was in fact emphasised by Hepworth J in *Public Prosecutor v Teoh Choon Teck* at p 35 where he said:

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

The qualification, however, is also stated by the learned judge in the same page with which we respectfully agree:

> It will be observed that nowhere do ss 162, 163 and 164 say that the accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge.

Where the application under s 51(i) of the Criminal Procedure Code is made in the course of the trial, the rule of relevancy must be strictly enforced. We feel that this is what *Mallal's Criminal Procedure* meant by saying that 'anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions'.

If the discretion is to be exercised before the commencement of trial the court cannot anticipate how the prosecution will proceed. In other words the court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under s 51 of the Criminal Procedure Code. In the first place the accused should know what documents had been taken from him and to say that unless such documents were delivered for his inspection he would not be able to adequately prepare his defence cannot be a true proposition. *A general demand for unspecified documents should likewise not be entertained*. (Emphasis added.)

[50] In the Federal Court case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312 it was held that in an application pursuant to s 51 of the CPC, at pre-trial stage, a roving and fishing inquiry for evidence is not permissible:

> [46] ... (at p 330) One settled principle attached to the application for discovery under s 51 of the CPC is that, *at pre-trial stage, a roving and fishing inquiry for evidence is not permissible. A catch all net cannot be cast*. The appellant is not entitled to know by what means the prosecution proposes to prove the facts underlying the charge he faces. This remains the prerogative of the prosecution. (Emphasis added.)

[51] The pre-requisites for the application of the section therefore seems to be that the documents sought for must be relevant, specific and not in the nature of a fishing expedition. Pursuant to the provisions of s 51, the documents further must be with the party against whom the order is sought.

[52] Although normally invoked by the accused against the prosecution, these principles and the section itself are no less relevant to a situation as the present, where the prosecution is employing in aid the provisions of s 51 against the accused ('the appellant').

[53] A perusal of the subject matter of the criminal breach of trust ('CBT') charges as gathered from the record of appeal would show that they relate to two floor spaces at JB Sentral namely the following:

(a) RK17, First Floor, JB Sentral; and

(b) RK11, First Floor, JB Sentral

which were let to Point Convenience Shop Sdn Bhd and Met Mint (M) Sdn Bhd respectively by Southern Flame Sdn Bhd, a company owned by the appellant and his family members although the two floor spaces were leased to Southern Ads Sdn Bhd.

[54] All the original documents necessary to prove the CBT charges would thus be indispensable to the prosecution in proving those charges. The test of relevancy was thus satisfied.

[55] The list of documents sought for by the prosecution were as follows:

(a) receipts of payments, invoices and monthly rentals of RK17, First Floor, JB Sentral from Point Convenience Shop Sdn Bhd to:

(i) Tetuan Kamal Hisham & Assoc;

(ii) Southern Flame Sdn Bhd; and

(iii) Kamal Hisham bin Jaafar ('the appellant'); A

(b) letter of offer to let by Southern Flame Sdn Bhd of RK17, First Floor, JB Sentral to Point Convenience Shop Sdn Bhd

(c) receipts of payments, invoices and monthly rentals of RK11, First Floor, JB Sentral from Met Mint (M) Sdn Bhd to: B

(i) Tetuan Kamal Hisham & Assoc;

(ii) Southern Flame Sdn Bhd; and

(iii) Kamal Hisham bin Jaafar ('the appellant'); C

(d) letter of offer to let by Southern Flame Sdn Bhd of RK11, First Floor, JB Sentral to Met Mint (M) Sdn Bhd.

[56] The documents enumerated above were precisely described and left nothing to the imagination. This being the case, it cannot be justifiably alleged that the description of the documents sought for had lacked specificity nor were they in the nature of a fishing expedition. D

[57] The appellant is also the majority shareholder of Southern Flame Sdn Bhd and the senior partner in the firm of Messrs Kamal Hisham and Assoc. That being the case, it is only reasonable to assume that the original documents were either within his possession or that he had unhindered access to them. E

[58] Should such application be refused, it would mean that should a situation arise during the trial of the action where the appellant ('the accused') raises the argument of adverse inference against the prosecution ('the respondent') that documents were not supplied, the prosecution would be left unable to answer the point. Applying for the documents at that stage would tantamount to the proverbial, 'closing of the stable doors after the horses have bolted'. It was therefore necessary for the prosecution to make the application at this pre-trial juncture. F G

[59] This also meant that this application had met the twin requirements of proving that the documents sought for were 'necessary or desirable' for the purpose of the trial, see *Dato' Seri Anwar bin Ibrahim v Public Prosecutor*. H

[60] In hearing this appeal, it was also not lost upon me that s 51 is to be construed differently from s 51A of the CPC as they are separate and distinct from each other. See *Dato' Seri Anwar bin Ibrahim v Public Prosecutor*. Whereas s 51A imposes an obligation on the prosecution to supply certain documents and materials, s 51, though limited in its application, gives the court discretion in allowing for discovery in specific instances. Being in the nature of a discretion, any such exercise of it ought not to be interfered with save for good I

A reason. I find that none exists in this case.

B **[61]** The learned sessions court judge had therefore not erred in law or fact in allowing the application by the prosecution under s 51 of the CPC and neither did she err in holding that these documents were necessary for the prosecution in avoiding any anticipated allegation during the course of the trial, of adverse inference under s 114(g) of the Evidence Act 1950 for failure to produce the original documents.

C **[62]** All the pre-requisites of s 51 were therefore satisfied and I therefore dismissed the appeal by the appellant.

Appeal dismissed.

D Reported by Nisha Paran

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